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IN THE

Supreme Court of the United States

October Term, 1982

GEORGIA RESIDENTIAL FINANCE AUTHORITY, et al.,

Petitioners,

v.

KATHERINE JEFFRIES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a statute, which permits a one month lease between a private landlord and a Section 8 Existing Housing Program tenant and which permits only the Public Housing Agency to issue any notice to vacate following a landlord's decision to terminate the lease, create a property interest in the tenant to occupy the rental unit for the full lease term even though the lease is for a term longer than one month and permits at will termination upon thirty days notice in accordance with HUD regulations?

2. Where a private landlord exercises a mid-term at will termination option in his lease with a Section 8 Existing Housing Program tenant by giving thirty days' advance written notice, does the Public Housing Agency's subsequent issuance of a notice to vacate constitute sufficient "State action" to invoke the Due Process Clause?

3. Under Rule 19 of the Federal Rules of Civil Procedure, should class certification be denied for failure of a plaintiff class to name all of its private landlords as a defendant class in an action challenging the right of the landlords to enforce termination provisions in their Section 8 Existing Housing Program leases?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiffs-Appellees

Katherine Jeffries, Rose Hector, Eddie Maude Franklin and Belinda Clarke, on behalf of themselves and all others similarly situated

Defendants-Appellants

Georgia Residential Finance Authority; the Director of the Section 8 Existing Housing Program for the Georgia Residential Finance Authority and the Area Representative for Rockdale County, Georgia for the Georgia Residential Finance Authority, in their official capacities.

Defendants in the District Court also included the Secretary of the United States Department of Housing and Urban Development and the Director of the United States Department of Housing and Urban Development Atlanta Area Office, in their official capacities, and R. F. Taptich d/b/a Midtown Apartments. These Defendants did not participate in the proceeding in the Court of Appeals.

The instant petition to this Honorable Court for issuance of a writ of certiorari is presented on behalf of Defendants-Appellants Georgia Residential Finance Authority and the two officers of the Georgia Residential Finance Authority in their official capacities.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Jeffries v. Georgia Residential Finance Authority*, 678 F. 2d 919 (11th Cir. 1982). The opinion of the District Court is reported as *Jeffries v. Georgia Residential Finance Authority*, 503 F. Supp. 615 (N. D. Ga. 1980). Three unreported opinions of the district court, the reported opinion of the district court, the reported opinion of the Court of Appeals and the Court of Appeals' judgment are all included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was rendered and entered on June 14, 1982. This petition for a writ of certiorari is filed within ninety

days of the Court of Appeals' judgment. The jurisdiction of this Honorable Court is invoked under 28 U. S. C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U. S. Constitution, Amend. XIV §1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. §1437f(d):

(1) "Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that

* * *

(B) the agency shall have the sole right to give notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy;

* * *

(2) Each contract for an existing structure entered into under this section shall be for a term of not less than one month nor more than one hundred and eighty months."

* * *

Rule 19, 28 U. S. C.:

Joinder of Persons Needed for Just Adjudication.

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can

be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

24 C. F. R. §882.107(b):

"Term of Lease and of Housing Assistance Payments Contract. The Lease shall be for not less than one year nor more than three years but may contain a provision permitting termination upon 30 days advance written notice by either party. The term of the Lease shall be as agreed by the Family and the Owner, subject to the limitations of the preceding sentence. The term of the Contract shall be for the term of the Lease . . ."

STATEMENT OF THE CASE

This case arises from the mid-term termination of leases and the initiation of eviction proceedings by a private landlord, R. F. Taptich, against four tenants, the named Respondents, who were participants in the Section 8 Existing Housing Assistance Payments Program administered by the Georgia Residential Finance Authority ("GRFA") for the United States Department of Housing and Urban Development ("HUD"). In July, 1979, the Respondents initiated this class action against GRFA, against the Director of GRFA's Section 8 Program and the GRFA Rockdale County Section 8 Program Area

Administrator in their official capacities, against the Secretary of HUD and the Director of HUD's Atlanta office in their official capacities and against R. F. Taptich d/b/a Midtown Apartments. The district court's jurisdiction was invoked under 28 U. S. C. §1343(3) and 42 U. S. C. §1983 for an alleged deprivation of rights secured by the Constitution and laws of the United States. The Respondents sought declaratory and injunctive relief against the exercise of a thirty day at will termination provision contained in each of the leases entered into between GRFA Section 8 Existing Housing Program participants and their more than 2,000 private landlords. The Respondents also sought declaratory and injunctive relief against HUD and GRFA lease termination and eviction procedures which permitted the inclusion and exercise of such a provision in the leases.

The District Court certified a plaintiff class to include all GRFA Section 8 Existing Housing Program tenants whose leases provide for a minimum term of one year but permit termination upon thirty days notice and whose leases have been or are being terminated by their landlords. Deciding the issues on cross motions for summary judgment, the District Court entered a judgment for Respondents and granted them declaratory relief. Relying upon a provision in the Section 8 statute (42 U. S. C. §1437f[d][1][B]) which requires the Public Housing Agency ("PHA")—GRFA is a PHA—to send the notice to vacate, the Court held: (1) that sufficient state action exists in Section 8 Existing Program lease terminations and evictions to invoke the Due Process Clause; (2) that Respondents have a constitutionally protected property interest in continued occupancy of their rental units until the end of their lease terms, notwithstanding a lease clause complying with HUD regulations which permits at will mid-

term lease terminations upon thirty days' notice by either party; and (3) that landlords may only terminate Section 8 Existing Housing Program leases mid-term after a determination by GRFA that good cause exists.[1]

The Court of Appeals for the Eleventh Circuit affirmed the District Court decision.

(1) General description of the Section 8 Existing Housing Program

The Section 8 Existing Housing Program was established by Congress pursuant to its enactment of Section 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. 42 U. S. C. §1437f. The Program provides rent subsidies on behalf of tenants who rent from private landlords. Implementing regulations promulgated by HUD are found at 24 C. F. R. Part 882.

The Section 8 Existing Housing Program is administered either by HUD or by a PHA like GRFA. GRFA issues Certificates of Participation to families who are responsible for finding existing housing units on the private market which meet their needs and desires and which meet Program requirements, such as minimum housing quality standards and rent limitations. The family is provided mobility under the Program in that the subsidy attaches to the family rather than the rental unit, thus enabling the family to use its Certificate to locate and move into another unit.

[1] The District Court also held that the HUD regulation governing eviction (24 C.F.R. §882.215) fatally conflicts with the Section 8 statute by failing to require the PHA to send the notice to vacate. Petitioners did not appeal this holding in the Court of Appeals. However, Petitioners did appeal the District Court's holding that by requiring the PHA to send the notice to vacate, the statute prohibits mid-term lease terminations except for good cause.

The landlord and family enter into a form Lease Agreement which has been approved by HUD. The landlord and GRFA enter into an agreement referred to as the Housing Assistance Payments Contract ("HAP Contract"), which provides for rent subsidy payments by GRFA to the landlord.

Lease terminations and evictions in the Section 8 Existing Housing Program will be discussed in the section of this petition entitled "Reasons for Granting the Writ."

(2) **The named Respondents**

The four named Respondents used their Certificates in the GRFA Section 8 Program to rent apartments from a private landlord, R. F. Taptich. Each of the leases provided for termination by either party upon thirty days advance written notice, as permitted by HUD regulations. Record, pp. 1567, 1568. After several months, Mr. Taptich gave such notice and also stated his intent to discontinue participation in the Section 8 Existing Program. Record, p. 1578. The subsequent initiation of eviction proceedings by Mr. Taptich against two of the named Respondents led to the filing of this action. After offering a hearing which was refused by Respondents, GRFA approved the lease terminations on the grounds that Mr. Taptich properly terminated the leases by giving the requisite thirty days advance written notice. Record, pp. 1688, 1689, 1700. By agreement of the parties, however, the named Respondents were permitted to stay in their rental units until their lease terms expired. The last lease expired on March 31, 1980, three months before the District Court entered a preliminary injunction order on behalf of Respondents. Record, p. 1567. None of the leases were renewed.

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals' decision sets an important and far-reaching precedent in entitlement law by finding a property interest protected by the Due Process Clause arising out of an agreement between private parties such that the agreement may not be terminated pursuant to its terms. The decision is contrary to the well-established construction of the Section 8 Statute by HUD, the agency charged with the statute's administration. Furthermore, the decision is in direct conflict with *O'Bannon v. Town Court Nursing Center*, 447 U. S. 773 (1980) and *Flamm v. Real Blt, Inc.*, 424 U. S. 1313 (Rehnquist, Circuit Justice, 1976).

The Court of Appeals acknowledged that the Section 8 Existing Housing Program statute permits a lease between a private landlord and a Section 8 tenant for a term as short as one month. 42 U. S. C. §1437f(d)(2). Therefore, the decision by the Court that the Section 8 statute prohibits the at will termination of a longer lease on thirty days notice pursuant to its terms and creates a constitutionally protected property interest for the full lease term is a far-reaching decision in entitlements law.

The Court found the source of the entitlement to be contained in 42 U. S. C. §1437f(d)(1)(B) which states "the agency shall have the right to give the notice to vacate, with the owner having the right to make representation to the agency for termination of tenancy." [1]

---

[1] Section 326(e) of the Omnibus Reconciliation Act of 1981 provided for the amendment of 42 U. S. C. §1437(d)(1)(B):

> (1) Section 8(d)(1)(B) of the United States Housing Act of 1937 is amended to read as follows:
>
> "(B) (i) the lease between the tenant and the owner shall be for at least one year or the term of such contract, whichever is shorter, and shall contain other terms and conditions specified by the Secretary; and

The Court reasoned that requiring the PHA to send the notice to vacate would be meaningless unless Congress intended to impose a good cause requirement for lease terminations and evictions.[8]

The reading-in of the good cause requirement is strained and, as applied, conflicts with the statute which provides for a minimum entitlement of one month and HUD regulations which permit one-to-three year leases terminable at will upon thirty days notice. If a "property" right has been taken in this litigation, it is the right of the landlord to be out of the Program within the statutory time of one month.

Furthermore, the reading-in of the good cause requirement is not the only meaningful construction of 42 U. S. C. §1437f(d)(1)(B). When a lease is terminated, before GRFA sends a notice to vacate it conducts a review which permits it to determine whether the lease has been properly terminated under the thirty day notice provision, or if not, on the basis of other grounds sufficient under the lease. GRFA can counsel the landlord and tenant and perhaps resolve their differences. If GRFA authorizes the proposed eviction and sends the notice to vacate, it can meet with the tenant and aid the tenant in locating other

"(ii) the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause;".

(2) The amendment made by paragraph (1) shall apply with respect to leases entered into on or after October 1, 1981.

Although the statutory amendment also permits a lease for a one month term (*see* 42 U. S. C. §1437f[d][2]), Petitioners' arguments will exclusively address the pre-amendment statutory language governing leases entered into prior to October 1, 1981. Although new GRFA leases have been modified to comply with the amended statute, many of the original leases are still in effect.

[8] The United States Court of Appeals for the Fourth Circuit also adopted this view and imposed a good cause requirement for end of lease term evictions. *Swann v. Gastonia Housing Authority*, 375 F. 2d 1342 (4th Cir. 1982).

housing on the private market where the tenant can continue Program participation. By sending the notice to vacate GRFA also knows to stop making rent subsidy payments to the landlord after the tenant vacates. The PHA review of lease terminations required by 42 U. S. C. §1437f(d)(1)(B) is not meaningless absent a good cause requirement.

The Court of Appeals also relied upon 42 U. S. C. §1437f (e)(2) which gives exclusive authority to terminate tenancies to the landlords in the other two Section 8 programs, the new construction program and the substantial rehabilitation program. The Court reasoned that Congress must have intended a good cause requirement in the Existing Housing Program by providing a distinct termination mechanism. It is worthy, of note, however, that HUD in looking at the statutory schemes for each of the three Section 8 programs promulgated regulations which required good cause for mid-term lease termination in the other two programs and which did not provide such a requirement in the Existing Housing Program. 24 C. F. R. §880.607; 24 C. F. R. §881.607. Perhaps this was in recognition of the need to attract private landlords into the Existing Program by offering them an "out" and in recognition of the longer contractual terms and the greater benefits accorded the landlords in the other two programs which arguably confer them with quasi-public status carrying good cause requirements in their terminations of tenants' leases.

The Court also relied upon the legislative history of the recent amendment to the Section 8 Existing Housing Program Statute (see footnote 2 for the language of the amendment) which eliminates the requirement that the PHA send the notice to vacate and which requires leases

entered into after October 1, 1981 to contain a provision requiring good cause for mid-term lease terminations. The statements made by the Conferees, however, do not disclose an intent that prior leases could be terminated mid-term only for cause. H. R. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 694-95, reprinted in [1981] U. S. Code Cong. & Ad. News 1010, 1053. In fact, by requiring the insertion of the provision in prospective leases, there was a recognition that in order for such a good cause termination requirement to be fairly imposed upon private landlords, the requirement must appear in the contract documents to which the landlords are parties. It is fundamentally unfair for a Court to change the terms of the private landlords' contractual commitments, especially where the statutory entitlement sources found by the Court in the pre-amendment language is vague at best.[4]

HUD Regulation 24 C. F. R. §882.107(b) [5] clearly provides for leases with one to three year terms which are terminable at will by either party upon thirty days notice. This regulation implements 42 U. S. C. §1437f(d)(2) (providing for a HAP contract and implicitly a lease for a

[4] This Court's recent opinion in *Pennhurst State School v. Halderman*, 451 U. S. 1 (1981) has application to the obligations and rights of these landlords. In *Pennhurst* the Supreme Court refused to impose retroactive conditions upon a state which voluntarily began participation in a federal grant program where those conditions were not placed upon the state explicitly by Congress. Landlords in this case who entered the Program with valid expectations they could terminate leases at will on thirty days written notice should have been given the same consideration as the states in *Pennhurst*.

[5] This regulation has been recently amended to comply with the statutory amendment set out in footnote 2. It no longer permits mid-term at will lease termination provisions. Also in compliance with the statutory amendment, the amended eviction regulation (24 C. F. R. §882.215) requires that leases entered into after October 1, 1981 contain a provision prohibiting mid-term termination except for cause. 47 Fed. Reg. 33497 (August 3, 1982).

term as short as one month) by permitting a longer lease which can be terminated by either party upon thirty days written notice without cause and with whose termination the HAP Contract would also terminate. Such a lease and HAP Contract comply with Congressional approval of a one-month term while providing more certainty and fewer administrative headaches than a series of one-month leases and HAP contracts. In fact, HUD considered and rejected imposing a good cause requirement on lease terminations and evictions. See 41 Fed. Reg. 16924 (April 22, 1976) and 41 Fed. Reg. 43330 (Sept. 30, 1976).

In 1976, HUD approved as complying with Program requirements GRFA's Standard Lease Form which provided for termination upon thirty days advance written notice by either party.[6] Record, p. 1577. And in 1977 HUD, by Notice 77-13 (PHA) sent to GRFA and other PHAs, encouraged the use of such a provision in order to attract private landlords into the Section 8 Existing Housing Program. Record, pp. 1573, 2987. HUD recognized that the Section 8 Program goals of aiding lower income families in obtaining a decent place to live and promoting economically mixed housing could only be accomplished if private landlords entered the Program. 42 U. S. C. §1437*f*(a).

The Court of Appeals erred by failing to accord deference to HUD regulation 24 C. F. R. §882.107 which was promulgated contemporaneously with the Section 8 Statute and which has been the long-standing construction of Section 8 statutory requirements for lease durations and

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[6] Under Georgia law a thirty day at will termination clause in a lease is enforceable. *Moon v. Daniel*, 64 Ga. App. 363, 364, 13 S. E. 2d 187 (1941); Dawkins, *Georgia Landlord & Tenant-Breach & Remedies* §5-4 (1979).

mid-term lease terminations. See *Udall v. Tallman*, 380 U. S. 1, 16 (1964).

Finally, the Court of Appeals' decision conflicts with this Court's analysis in *O'Bannon v. Town Court Nursing Center*, 447 U. S. 773 (1980), which holds that nursing home patients do not have a constitutionally protected property interest in continued residence at a particular facility which would entitle them to a hearing prior to decertification of the facility by HEW and DPW. In reaching its decision, this Court looked to "the contours of the right conferred by the statutes and regulations." *Id.*, at 786.

The statute and regulations in the instant case compel even more strongly a finding of no entitlement to continued occupancy. Unlike the Medicaid provisions which expressly prohibit a nursing home's discharge of a patient, once admitted, for reasons other than those excepted by the regulations, the Section 8 Existing Housing Program statute does not provide for a continuing landlord-tenant relationship once a lease is executed. On the contrary, the statute permits a one month lease and the regulations implementing it permit a lease that can be terminated at will by either party upon thirty days written notice. *O'Bannon* held that since decertification does not reduce or terminate a patient's financial assistance but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in benefits are irrelevant. Upon the termination of a Section 8 Existing Housing Program lease, the tenant does not lose the right to continue participation in the Program. The tenant is merely required to locate and continue assistance in a different rental unit. 24 C. F. R. §882.103; 41 Fed. Reg. §43330 (Sept. 30, 1976).

The Court of Appeals' decision also directly conflicts with *Flamm v. Real-Blt, Inc.*, 424 U. S. 1313 (Rehnquist, Circuit Justice, 1976). Justice Rehnquist denied a tenant applicant's motion to stay the judgment of the Supreme Court of Montana [1] for the reason that a thirty day termination provision contained in her federally subsidized low-income housing project lease made it unnecessary to reach her contentions that her landlord was subject to Due Process Clause limitations before evicting her. The tenant contended that the housing project was so intertwined with the Federal Government that its action in evicting her was subject to the limitations of the Due Process Clause of the Fifth Amendment. She further contended that these limitations entitled her to a statement of reasons amounting to a showing of good cause and to a hearing before she could be evicted. The Supreme Court of Montana failed to find sufficient government involvement to invoke the Due Process Clause. However, Justice Rehnquist relied upon the thirty day lease termination provision to deny the stay, stating:

> "In view of the express provision of the lease, it seems to me that this Court, if it were to hear and decide the case, would find it unnecessary to reach the question of whether respondent's activities are subject to the Due Process Clause of the Fifth Amendment . . ."

Id., at 1314.

2. The Court of Appeals' finding of state action in a PHA's nondiscretionary, ministerial act of sending a notice to vacate which constitutes mere acquiescence to a private party's action and which carries with it no depriving attributes conflicts with applicable decisions of this Court.

The Court of Appeals based its finding of state action

[1] *Flamm v. Real-Blt, Inc.*, 168 Mont. 351, 543 P. 2d 190 (1975), *cert. denied*, 425 U. S. 941 (1976).

in part upon the intertwining relationship between GRFA and the private landlord who has actually acted. It stated that the privity of contract and conferring of mutual benefits (between the private landlord and GRFA) results in a concert of action sufficient to be designated state action under *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961). In *Jackson v. Metropolitan Edison Co.*, 419 U. S. 345 (1974), however, the Supreme Court discussed the narrowness of the *Burton* holding, stating that "differences in circumstances beget differences in law, limiting the actual holding to lessees of public property." *Jackson, supra*, at 726.

Like the state regulated public utility in *Jackson*, the Section 8 Existing Housing Program landlord is a private entity or person who does not lease business property from GRFA or the State. GRFA derives no profit from the landlord's business and is not "in any realistic sense a partner or a joint venturer" (*see Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 176-177 [1972]) in the landlord's enterprise of renting dwelling units. The private landlord who elects to rent to a Section 8 tenant carries out traditional landlord responsibilities and receives no mortgage subsidies or monetary benefit from GRFA other than rent subsidy payments, which are conditioned upon the family's occupancy and end when the family elects to move elsewhere. He receives no GRFA guarantee that he will be paid the family portion of the rent. Record, p. 2978. He cannot even receive vacancy payments from GRFA where the tenant properly terminates the lease. 24 C. F. R. §882.105. By participating in the Section 8 Existing Housing Program, the landlord does not dilute his private status.

In *Jackson, supra*, this Court held there is no state

action when a private party merely "exercises a choice allowed by State law where the initiative comes from it and not from the State." Mere state acquiescence of a private action, as opposed to State compulsion of it, does not convert the action to state action. *Id.*, at 357; *See also, Flagg Brothers, Inc. v. Brooks*, 436 U. S. 149, 164 (1978). Although GRFA provides its Certificate holders and the private landlords they select a lease which permits termination by either party upon thirty days notice, it does not compel the use of such a clause by the landlord. In furnishing the lease, GRFA's role is comparable to that of the state regulatory commission in approving the termination procedure used by the utility in *Jackson* and to that of the state legislature in permitting a warehouseman's private sale of goods entrusted to him by a bailor in *Flagg Brothers, Inc.*

Nor does the statutory requirement that the landlord inform GRFA of lease termination and that GRFA send the notice to vacate convert to state action the landlord's private action of exercising the thirty day clause and later filing of eviction proceedings. GRFA has no discretion to prevent the lease termination where the landlord has exercised the thirty day clause. GRFA can only determine the presence of a notice of termination and the lapse of time and provide counseling.

Furthermore GRFA's issuance of the notice to vacate (at the landlord's instigation) is not the act causing dispossession. It does not have the depriving attributes of the government action in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), *Fuentes v. Shevin*, 407 U. S. 67 (1972) or *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). To dispossess under Georgia law, the landlord, without GRFA, must prevail in adversary

proceedings before a court may issue a writ of possession. Ga. Code Ann. Ch. 61-3. GRFA's ministerial act has no meaning at all unless the landlord invokes judicial remedies. GRFA does not perform the overt act causing loss of occupancy.

3. The Court of Appeals construed an important federal procedural rule, Rule 19 of the Federal Rules of Civil Procedure, in an unduly restrictive manner to deny its protections to thousands of private landlords participating in the Section 8 Existing Housing Program. The Court misapplied *National Licorice Co. v. NLRB*, 309 U. S. 350 (1940) to hold that the Rule does not protect parties to a contract whose interests could be adversely affected by a lawsuit involving a "public" right.

The Respondent class was certified to include GRFA Section 8 participants whose leases contain a thirty day termination provision and whose landlords have terminated or are terminating their leases. For every class member is a private landlord who has entered into a lease agreement with that class member. The lawsuit attacks the right of GRFA Section 8 landlords to exercise the thirty day termination provision in their leases. However, the only landlord named as a defendant was the named Respondents' landlord, Mr. Taptich. He participated minimally in the litigation in the District Court and not at all in the Court of Appeals.*

In holding that these landlords are not indispensable parties under Rule 19, the Court of Appeals noted the

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* Although the opinion issued by the Court of Appeals refers to arguments presented by the "owners", there were no landlords presenting arguments in the Court of Appeals. Presumably, the Court intended a reference to GRFA. However, please note that GRFA is in no sense an owner or landlord of the private units rented by Section 8 tenants.

Respondents' arguments that the landlords had no part in drafting the contract documents to which they were parties and that Rule 19 exempts class actions from its provisions. Such broad exceptions from the Rule's provisions conflicts with its purpose. Although Rule 19(d) states that Rule 19 is subject to Rule 23 governing class actions, it should be clear from the rules that this exemption exists only with respect to indispensable party arguments made in regard to those represented by the class.

Rule 19 exists to prevent the issuance of an Order fundamentally affecting the contractual rights of parties not before the Court. Whether the landlords had a part in drafting the terms of the HUD-approved leases they executed is irrelevant. Instead, it is important that each landlord after reading the leases and HAP contracts could have chosen to decline to sign the contracts and make their rental units available. By executing the contracts, the landlords elected to enter the Program on the basis of understandings of their rights under the terms of those contracts.

The Court of Appeals stated that the holding of the District Court does not in a practical sense prejudicially affect the interests of the landlords, that the absent landlords' interests might not conflict with the tenants' claims and that the suit does not challenge the propriety of the actions of the named landlords or absent landlords.

By definition of the Respondent class, the absent landlords include those landlords who have terminated or are terminating tenants' leases mid-term by use of the thirty day termination provision. Therefore, the Respondents' entitlement claim directly conflicts with the interests of the absent landlords. The Respondents challenged the propriety of and sought relief against the absent land-

lords' exercise of the thirty day clauses in their leases. The Judgment rendered below as a practical matter has had the effect of destroying the landlord's contractual rights without due process. *See Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U. S. 102, 123 (1968). Under the Court of Appeals' holding, GRFA may not send a notice to vacate following an absent landlord's termination of a tenant's lease until GRFA has determined that good cause exists. Sending the notice to vacate is a prerequisite to filing dispossessory proceedings in Georgia. *See*, Ga. Code Ann. Ch. 61-3. Also, in a dispossessory proceeding in Georgia courts, the Court of Appeals' Judgment will be noted and good cause will be viewed as a prerequisite to the absent landlord's right to evict the tenant. *See, e.g., Milam v. Housing Authority of Columbus*, 129 Ga. App. 188, 199 S. E. 2d 107 (1973); *Jenkins v. Allen Temple Development*, 127 Ga. App. 61, 192 S. E. 2d 714 (1972). Thus, the landlords' ability to protect their property interest in their leases has been impaired as a practical matter.

Other Circuit Courts of Appeal have held that when litigation affects contractual rights or there is otherwise a common judicial link, all parties to the instrument or who are so affected are necessary parties. *See Neal v. System Board of Adjustment*, 348 F. 2d 722 (8th Cir. 1965) (per then-Judge Blackmun). A specific application of this rule is that of the landlord or tenant whose interests are at stake. *Lomayaktewa v. Hathaway*, 520 F. 2d 1324 (9th Cir. 1975); *cf. Sierra Club v. Hathaway*, 579 F. 2d 1162, 1166 (9th Cir. 1978) (lessees). *See also, Commonwealth Trust Co. of Pittsburg v. Smith*, 266 U. S. 152 (1924).

The Court of Appeals also held that since the lawsuit seeks vindication of a public right, the private landlords

who could be adversely affected do not thereby become indispensable parties. In so holding it misapplied *National Licorice Co. v. NLRB*, 309 U. S. 350 (1940). There the Supreme Court upheld the National Labor Relations Board's order that an employer desist from taking benefit from contracts with its employees which were in violation of the National Labor Relations Act, notwithstanding the absence from the Board's proceeding of the employees who signed the contracts. The Supreme Court, however, carefully noted that the Board's order only prevented the employer from carrying out contract terms which impose illegal restraints upon the employees' rights to organize and bargain collectively. Significantly, the Supreme Court stated that the Board's order does not foreclose the employees from taking any judicial action upon their contracts or prejudge their rights in the event of such litigation. *Id.*, at 365. In contrast, as discussed above, the landlord's contractual rights have been foreclosed and prejudged as a practical matter.

The Court of Appeals also made much of its determination that the indispensable party objection was not timely raised. Petitioners had pointed out to the Court in their appellate briefs and at oral argument, however, that they raised the issue of joinder in the District Court in their Answer to the Complaint and subsequently in briefs in opposition to Respondents' motions concerning class certification and in a brief supporting Petitioners' Rule 12(h)(2) motion. Record, pp. 160-163, 359, 541, 542, 1129.

Since GRFA's interests are not co-extensive with those of the private landlords, arguments may have been lost by nonjoinder of landlords. An active landlord litigant might have raised and developed an issue such as uncon-

stitutional confiscation of private property to rebut Plaintiffs' entitlement claim.

Since at this late stage it is not feasible to join the landlords individually or as a class, Petitioners would urge that the class action aspects of the lawsuit be dismissed. Although the case would become moot upon such dismissal inasmuch as the named Respondent's leases have expired and have not been renewed, the fact is that they were forewarned of the need to satisfy Rule 19 by the first defensive pleading filed.

This decision sets an important precedent for the application of Rule 19 to absent landlords in future litigation brought by Section 8 Existing Housing Program tenants. It denies thousands of landlords the protections accorded by the Rule. Beyond impacting upon Section 8 litigation, the decision sets a precedent to deprive absent parties of Rule 19 protections in class action litigation where the absent parties are not represented by the class and have interests adverse to the class. Furthermore, the holding that contracting parties whose rights under a contract are being attacked are not indispensable in litigation seeking vindication of a "public" right has far-reaching application.

CONCLUSION

For all of the reasons stated the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case should be granted and the decision below reversed by this Honorable Court.

Respectfully submitted,

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